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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 348

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC.,
Petitioner,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, As Successor to the Alien Property Custodian, and IVY BAKER PRIEST, TREASURER OF THE UNITED STATES, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 6, 1957.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Societe Internationale Pour Participations Industrielles et Commerciales, S.A.,[1] a Swiss holding corporation having its domicile at Basel, Switzerland—plaintiff in the District Court in an action for recovery of vested property under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9a) — prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District

[1] For sake of brevity, petitioner is known as "I.G. Chemie" or "Interhandel".

of Columbia Circuit entered on April 11, 1957, in two consolidated appeals[2] — Court of Appeals Nos. 13,460 and 13,527 — affirming orders of the District Court dated July 11, 1956 (R. 1935) and July 23, 1956 (R. 1980) denying an extension of time,[3] and orders of the District Court dated August 3, 1956 (R. 2017) and August 21, 1956 (R. 2026) entering judgment of dismissal against petitioner upon the Court of Appeals' mandate in No. 12,140 for alleged failure to perform a pretrial discovery order, and denying motion to vacate the dismissal order on the mandate, respectively.[4]

OPINIONS BELOW

The District Court wrote a short, unreported memorandum opinion in relation only to its order of July 11, 1956 (R. 1935). The opinion of the Court of Appeals (App. B to this petition, p. 27(a)) is reported at 243 F. 2d 254.

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[2] The record in Court of Appeals No. 12,140 is treated as a part of the record in the two consolidated appeals. The Court of Appeals' opinion in No. 12,140 will be found at page 5(a) of Appendix B to this Petition. The citation of that opinion is *Societe Internationale, Etc.* v. *Brownell*, 96 U.S. App. D.C. 232, 225 F. 2d 532 (D.C. Cir. 1955), petition for rehearing en banc denied September 1, 1955, cert. denied, 350 U.S. 937 (1956), petition for rehearing denied, 350 U.S. 976 (1956).

[3] To perform a pretrial discovery order. These two orders are involved in Court of Appeals No. 13,460.

[4] These are involved in Court of Appeals No. 13,527. In its opinion of April 11, 1957 (Appendix B, p. 27(a)), the Court of Appeals briefly described these as orders of the District Court which had "dismissed plaintiff's complaint with prejudice." Indeed, this was the first time such finality had actually occurred, in view of the modification in the Court of Appeals' earlier opinion of June 30, 1955, and the fact that the six-month grace period had not begun to run when certiorari was applied for and denied in 350 U.S. 937 (1956). See petition for rehearing in No. 500, October Term 1955, which was denied 350 U.S. 976 (1956).

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on April 11, 1957 (R. 2037). Order denying petition for rehearing was entered May 10, 1957 (R. 2050). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. May federal courts deny jurisdiction by dismissing with prejudice, for a plaintiff's involuntary inability to comply with a pretrial discovery order, a complaint for return of property summarily vested under the Trading with the Enemy Act, without adjudication on the merits of the issues presented, where suit was properly filed and all jurisdictional requirements were met, and

(a) there never was any administrative hearing or determination that the property was owned by enemies;

(b) the Trading with the Enemy Act gives divested owners a right to have the vesting reviewed in federal courts and to recover their property if found to be neither enemy nor enemy tainted, *Clark* v. *Uebersee Finanz Korporation*, 332 U.S. 480; and

(c) this Court has repeatedly held that unless the non-enemy owner is given an opportunity to obtain a complete judicial review of the vesting, any taking of property under the Trading with the Enemy Act would be violative of the Fifth Amendment to the Federal Constitution, *Stoehr* v. *Wallace*, 255 U.S. 239.

2. May the lower courts dismiss petitioner's complaint with prejudice but without adjudication on the merits, for its involuntary *inability* to comply with a discovery order, where this Court has held in *Hovey* v. *Elliott*, 167 U.S. 409 that the striking of any pleadings without an adjudication on the merits is a denial of due process of law, and where this Court subsequently held in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 that, in line with the *Hovey* ruling, pleadings may only be stricken if, after a *willful refusal* to make discovery, a presumption of bad faith in the pleadings can properly be inferred and the striking is thus on the merits?

3. May the lower courts order production of records for discovery before trial under Rule 34, Federal Rules of Civil Procedure, where it is shown that the records are neither in the possession nor custody of petitioner, and where the trial court itself concluded that petitioner does not have sufficient control over the records to bring about their release by their owner and thus to produce them for discovery? *Hickman* v. *Taylor*, 329 U.S. 495.

4. May the trial court, which had failed to designate the records to be produced with sufficient particularity to allow them to be identified, dismiss petitioner's complaint for its involuntary inability to make discovery, (a) without even considering petitioner's claim that over 200,000 records it has obtained and tendered to respondents constitute substantial discovery; and (b) where other discovery procedures, recommended by the Swiss authorities, could have identified all remaining relevant records, if any are still undisclosed, and permitted their discovery by letters rogatory?

5. Is the summary vesting of petitioner's property under the Trading with the Enemy Act valid under the Fifth Amendment to the Federal Constitution if petitioner, through no fault on its part, is denied access to Federal Courts on its claim that it is neither enemy nor enemy tainted and thus is entitled to return of its property?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent constitutional and statutory provisions and rules of procedure are printed in Appendix A, *infra*, pages 1(a) to 4(a).

STATEMENT

This petition is directed against a denial of jurisdiction over petitioner's complaint filed in accordance with the Trading with the Enemy Act, 50 U.S.C. App. 9(a), demanding return of property summarily seized by respondents. The reason given by the courts below for such denial of jurisdiction was that petitioner was *unable* to comply with that part of a discovery order demanding it to produce certain unidentified records of a Swiss bank.

Vesting of Petitioner's Property Under Authority of the Trading With the Enemy Act

Between the years 1942 and 1946 the Alien Property Custodian vested petitioner's property[5] under the alleged authority of Section 5(b), Trading with the Enemy Act, 50 U.S.C. App. 5(b), which allows the

[5] Consisting of cash and approximately 90% of the stock of General Aniline & Film Corporation, a Delaware corporation doing business in New York City. The value of this property is estimated to be in excess of 100 million dollars.

President to vest, but not to retain permanently,[6] property of anyone not a citizen of the United States. Petitioner filed administrative claims for the return of its property on the ground that it was not an enemy but a friendly neutral. These claims were summarily rejected by respondent on the ground that such return would be "contrary to the national interest". There was no hearing and no determination that petitioner was not, as claimed, a friendly neutral, or that it had no title to the property.

Petitioner filed a complaint in the United States District Court for the District of Columbia against respondents' predecessors. This complaint prayed for return of the vested property on the ground that petitioner was neither an enemy nor an ally of an enemy, and that under Section 9(a) of the Trading with the Enemy Act and the Federal Constitution the Alien Property Custodian was compelled to return property vested under Section 5(b) if shown that it was not owned by enemies or allies of an enemy (R. 148). *Stoehr* v. *Wallace*, 255 U.S. 239; *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480.

Respondent filed an answer to this complaint. The only issues are whether, under the doctrine of the *Uebersee* case, petitioner was "enemy tainted", and whether it really owned the vested property. Neither of these issues has come to trial.

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[6] Section 9(a), Trading with the Enemy Act (App. A, p. 3(a)) *Stoehr* v. *Wallace*, 255 U.S. 239; *Commercial Trust Co.* v. *Miller*, 262 U.S. 51; *Becker Steel Co.* v. *Cummings*, 296 U.S. 74; *Clark* v. *Uebersee Finanz-Korp.*, 232 U.S. 480; *Sielcken-Schwartz* v. *American Factors*, 60 F. 2d 43; *Uebersee Finanz-Korp.* v. *Markham*, 158 F. 2d 313.

Discovery Orders

In 1949, respondents moved for discovery under Rule 34, Federal Rules of Civil Procedure. The trial court ordered that petitioner produce in addition to its own records a stated number of records of the Swiss banking firm H. Sturzenegger & Cie (R. 339). Over petitioner's objections, this part of the discovery order

(1) demanded production of a large number of unidentifiable[7] records, the contents of which are not known; and

(2) ordered petitioner to produce records (not exclusively related to petitioner's dealings with the Bank) which are not its own, but are those of a bank not a party to the proceedings and to which petitioner did not have access as a matter of right, of law, or of fact (R. 1813; R. 517).

When the time came for petitioner to comply with the discovery order, it produced substantially all its

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[7] The trial court ordered petitioner to produce, *inter alia*,

"* * * *

(a) The some 700 jackets and 140 account books on the premises of I.G. Chemie and H. Sturzenegger & Cie., *examined in the course of the investigation of the German character of I.G. Chemie by investigators of the Swiss Compensation Office in 1945 and 1946.*" (R. 339-342; emphasis ours)

As to the bank's records, the Swiss Compensation Office, acting under the authority of the Swiss-Allied Accord or "Washington Accord", (1946) 14 State Dept. Bull. 1101-2, 1121-24, had investigated some 55,000 documents and 110 books of account of the Sturzenegger Bank (R. 199); meanwhile, these documents had been put back in their original jackets and nobody could now identify them among the other records of the bank (R. 397-9).

own records but was unable to obtain the Sturzenegger bank papers, not only because petitioner had no right or power to secure their production, but also because in order to protect Swiss criminal laws and the right given under Swiss law to bank customers to keep their records from being disclosed, the Swiss Federal Attorney had impounded them a few days before discovery became due (R. 435).

Thereupon, respondents moved to dismiss petitioner's complaint as sanction for its failure to produce the Sturzenegger records, charging a conspiracy and collusion between the Swiss Government and the petitioner to evade discovery (R. 417). The District Court referred this matter to Special Master William J. Hughes. After a painstaking investigation the Special Master found *inter alia*

(1) that petitioner had attempted in good faith to have the Sturzenegger records released (R. 468);

(2) that there had been no collusion between the Swiss Government and petitioner (R. 468);

(3) that under Swiss law, bank customers have a right to demand that records concerning them be not disclosed (R. 541);

(4) that when the Swiss Government impounded the Sturzenegger bank's records it did so to protect bank customers' rights and to prevent violation of economic espionage laws of Switzerland (R. 546); and

(5) that petitioner was unable to obtain the Sturzenegger records from the bank unless

special authorizations (waivers) were received from the bank customers consenting to the production of the records pertaining to them (R. 547).

Dismissal of Petitioner's Complaint Without Trial on the Merits as a Result of Petitioner's Involuntary Inability to Produce the Sturzenegger Records

The trial court ratified the Special Master's findings and conclusions in their entirety. It nevertheless affirmed its original discovery order after holding that, although petitioner had no access to the Sturzenegger records as a matter of right or as a matter of fact, petitioner had sufficient "control" over them to satisfy the requirements of Rule 34, Federal Rules of Civil Procedure. Petitioner thereupon undertook to obtain the Sturzenegger records by soliciting consents from the individual customers of the bank. By October, 1953, it had obtained and tendered for inspection by respondents over 63,000 Sturzenegger documents (R. 664). Respondents and the trial court refused even to look at these records (R. 666). While on the one hand affirming its earlier conclusion that appellant had sufficient "control" over the bank's records to satisfy Rule 34, the trial court now held that petitioner did not *in fact* have sufficient power over them to assure full production. Consequently, the court held that, since petitioner was not *able* to bring the required records before the court, its complaint would have to be dismissed with prejudice but without trial of the issues framed by the pleadings (R. 672.)

The trial court did not intend such dismissal as a punishment for refusal to comply with a discovery order, nor could it infer a presumption of bad faith

in the pleadings as in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322. "The issue", in the trial court's own words, "is one of jurisdiction" (R. 618). In other words, respondents could not be compelled to submit their summary seizure of petitioner's property to judicial scrutiny until all Sturzenegger records ordered produced had been made available to the parties and the court at pretrial.[8]

An appeal was taken from this denial of jurisdiction. The Court of Appeals affirmed the ruling below, reiterating the fact that dismissal was neither a punishment nor the result of a presumption of bad faith, but holding that if the Sturzenegger records were not made available the Court had to decline jurisdiction over petitioner's complaint. However, the affirmance of the Court of Appeals was with the following modification:

> "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits."

96 U.S. App. D.C. 232, 243, 225 F. 2d 532, 543, reh. den. A petition for a writ of certiorari to this Court was denied, 350 U.S. 937, reh. den. 350 U.S. 976.

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[8] Petitioner admits that the records of its "house" bank are relevant for purposes of pretrial. However, any inference that the Sturzenegger records contain material damaging to its case is entirely unjustified. The result of two investigations carried out by the Swiss Compensation Office after examining the Sturzenegger records negates the existence of damaging evidence.

Denial of Jurisdiction Affirmed Despite Tender of Substantial Discovery and Offer of Full Investigation of Remaining Bank Records

After denial of certiorari, petitioner, with the assistance of the Swiss Government, continued its efforts to obtain release of the Sturzenegger records by soliciting express consents from the bank's customers.[9] By June 24, 1956—when the six months' period expired—more than 190,000 Sturzenegger records had been obtained and tendered for discovery (R. 2012).[10] Petitioner submitted to the trial court that it was very likely that these records represented substantially all those covered by the order. Numerically, many more records were tendered than petitioner had been ordered to produce.[11] As to their nature, the bank records thus

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[9] Under Swiss law, bank customers have a vested right that information concerning them be not disclosed by the bank. Accordingly, petitioner and the Sturzenegger bank had to address to the bank's customers letters *requesting their consent* to the production of the Sturzenegger records as ordered. Petitioner *began* by seeking consents from the persons and firms whose names had been connected with it and with the issues raised at bar. Cf. *infra*, p. 12. "Secondary waivers" were obtained from persons or firms mentioned in the records of such "primary" bank customers. Once "consents" or "waivers" were obtained, the bank submitted to the Swiss Attorney General or his representatives the records concerning the assenting customer. If the consents were found to be valid, the records were turned over to petitioner which in turn tendered them to respondents.

[10] Thereafter, and up to the time of argument of the consolidated appeals in the Court of Appeals, more than 25,000 additional records were obtained (R. 2030; R. 2035).

[11] The discovery order, *ante*, p. 7, demanded production of 55,000 records and 110 books of account; petitioner provided in excess of 200,000 records and the books of account to the extent mentioned in footnote 17, *post*.

obtained were those pertaining not only to petitioner and its affiliates, but also to all persons and companies controlled by or close to petitioner and the Sturzenegger bank, and to the German and other foreign firms and individuals with which petitioner had dealings and for which it could conceivably have acted as a cloak.[12] As to the 110 Sturzenegger books of account which petitioner was ordered to obtain and produce, they have been tendered in Switzerland to the extent they are covered by waivers (R. 1951). See footnote 17, *post*.

However, since the records to be produced had not been designated in the discovery order with sufficient particularity to permit them to be identified, petitioner could not without further clarification from the court be certain whether it had obtained every paper re-

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[12] Early in these proceedings, respondents supplied a list of 124 names of companies and individuals "close to petitioner" from whom petitioner could have obtained waivers (R. 720). Respondents concluded that:

> "This list suggests the enormous number of documents which could have been freed for inspection by waivers. *We dare say for all practical purposes these documents amount to the total of all the Sturzenegger papers.*" (Emphasis ours)

Petitioner used this list as a starting point in its efforts to obtain waivers of secrecy rights. But as this undertaking progressed, new names were added because "secondary waivers" appeared necessary or because petitioner believed that other companies, individuals or special accounts might have records in the bank relevant to the issues at bar and inspected by the Swiss Compensation Office. On the other hand, several of the names originally listed by respondents turned out to have no records in the bank. As a result of petitioner's efforts papers concerning most of the crucial names were obtained and brought to Washington (R. 668; R. 1945; R. 2035). This being so, respondents' own words assert that these documents amount for all practical purposes to the total of all the Sturzenegger papers.

quired to be produced. For that reason, and to be certain that all relevant records of the Bank—whether or not covered by the discovery order—would be available for trial, petitioner suggested certain alternate discovery procedures designed to bring to light information as to any relevant records remaining in the bank's files. These additional discovery procedures had been proposed by the Swiss Government; they consisted mainly of the appointment by the parties of an independent investigator charged with examining the remaining files of the Sturzenegger Bank. Any "relevant"[13] material remaining there would be described and identified in a report to the parties, without violating any secrecy right. The parties would then request bank customers to consent to inspection of these documents and, in the event of a refusal, the records or information could be obtained—as suggested by the Swiss Government—by letters rogatory[14] or by arbitration proceedings in Switzerland. (R. 1954)

Thus the suggested discovery procedure was certain to: (1) *Identify* all remaining relevant documents in the Sturzenegger files; and (2) *Lay the groundwork for further efforts* to obtain full disclosure, where desired.

The trial court nevertheless refused to consider whether the documents already tendered constituted

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[13] The test of relevancy is contained in Rule 34 and could be spelled out in more concrete terms by the court for use by the independent investigator as a guide in his investigation.

[14] In most Swiss courts bank secrecy may be penetrated where the information is material to pending litigation. Thus individual Sturzenegger records might be inspected without the express consent of bank customers through judicial assistance incidental to letters rogatory. This procedure was expressly recommended by the Swiss Government (R. 1954).

substantial discovery. Reiterating once more that petitioner was in no way at fault, it refused to grant an extension of time to permit implementation of the additional discovery plan and dismissed petitioner's complaint with prejudice.

An appeal was taken from this dismissal, but the Court of Appeals affirmed the ruling below 243 F. 2d 254, reh. *en banc* den. (App. "B," p. 27(a)). Petitioner's arguments in the Court of Appeals are adequately set forth in its petition for a rehearing *en banc* printed in the Appendix hereto, pp. 31(a) to 37(a).

REASONS FOR ALLOWANCE OF THE WRIT

An earlier petition for certiorari in this case was denied by this Court in 350 U.S. 937, reh. den. 350 U.S. 976. That first petition was from a ruling of the Court of Appeals, 96 U.S. App. D.C. 232, 225 F. 2d 532, affirming the discovery order and dismissal, but granting petitioner further time to seek to comply with the discovery order and in that manner avoid dismissal of its complaint. Meanwhile, the denial of jurisdiction which petitioner foresaw in 1955, and which it had sought to prevent by invoking this Court's jurisdiction, has taken the form of a final ruling. But not only have the errors assigned in the first petition now matured into an absolute denial of due process of law; the lower courts have compounded their errors by arbitrarily refusing to consider petitioner's claim that, during the six-months' grace period it had substantially complied with the discovery order, and by turning down petitioner's proposal to employ other methods of discovery permissible under Swiss law to make certain that the discovery order had been or would be fully complied with.

Unlike in 1955, this case has now reached the point where only an intervention by this Court can protect petitioner from being denied a hearing on its complaint and, consequently, being deprived of its property without due process of law.

Theory of This Petition

This petition raises a fundamental problem as to the power of the federal courts to disregard the jurisdictional provisions of the Trading with the Enemy Act, found by this Court to be mandatory and essential to its constitutionality, *Stoehr* v. *Wallace*, 255 U.S. 239, and to deny jurisdiction where, in accordance with the Act, a divested owner seeks return of property summarily seized by the Alien Property Custodian.

This basic issue is novel and has arisen because the lower courts

(a) departed from the established concept of discovery—spelled out in *Hickman* v. *Taylor*, 329 U.S. 495, and accepted by the practice in other circuits—in ordering petitioner to produce before trial records to which petitioner did not have access and which, in the trial court's own view, petitioner was *in fact*, not able to obtain;

(b) departed from established discovery procedures by failing to designate the records to be produced with sufficient particularity to allow their identification, and then refusing to clarify its faulty designation after petitioner had made available over 200,000 records which by all indications represented substantial discovery;

(c) departed from established discovery procedures and standards of due process by arbitrarily refus-

ing petitioner's request for sufficient time to implement further discovery procedures which would have permitted full production in the event it had not already been made;

(d) disregarded this Court's rulings in *Hovey* v. *Elliott*, 167 U.S. 409, and *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, which limited the power to dismiss a complaint for failure to comply with a discovery order to instances where such non-compliance was *willful* and dismissal could operate on the merits by virtue of a presumption of bad faith in the pleadings of the disobedient party. In the case at bar non-compliance—if any—was admittedly not willful and under *Tot* v. *United States*, 319 U.S. 463, any presumption of bad faith would be a denial of due process;

(e) unnecessarily caused a conflict with the laws of a friendly nation by barring petitioner's efforts to make full discovery in the only manner which would not infringe legal rights and violate criminal laws of that friendly nation.

These successive errors and the resulting denial of jurisdiction have allowed respondents to evade judicial scrutiny of their summary seizure of petitioner's property without producing one scintilla of evidence in support of their position. This not only vitiates the constitutionality of any vesting under the Trading with the Enemy Act. If allowed to stand, the rulings below will further encourage serious abuses of the discovery process so as to deprive a litigant—as in the case at bar—of his day in court.

The Discovery Order Was in Conflict With the Federal Rules of Civil Procedure and With the Practice in Other Courts Following Hickman v. Taylor

The lower courts' concept of pretrial discovery was admittedly novel. In three important aspects it is in conflict with this Court's definition of discovery in *Hickman* v. *Taylor*, 329 U.S. 495, and with the views of other federal courts.

1. Mutuality

This Court held in *Hickman* v. *Taylor* that the new Rules were intended to allow "fullest possible knowledge of the issues and facts before trial" (p. 501), and for that purpose to permit "*Mutual* knowledge of all the relevant facts gathered by both parties". (p. 507; emphasis ours). The courts below departed from this premise of mutuality and demanded production of records which were not in fact available to petitioner itself, and the contents of which were not even known to it.

2. Control

Rule 34, Federal Rules of Civil Procedure provides that before a court can order discovery of any records it must be shown *inter alia* that they are in the "possession, custody *or control*" (emphasis ours) of the party from whom discovery is demanded. In other jurisdictions it has consistently been held that the term "control" must be given its ordinary meaning and thus implies actual power over the particular records. *Munroe* v. *United States*, 216 F. 107 (CCA 1st, 1914); *Fisher* v. *United States Fidelity & Guaranty Co.*; C.C.A. 7th, June 18, 1957, — F. 2d — 24 Fed. Rules Serv. 37b. 243, Case 3; *In re Harris*, (DC NY 1939) 27 F. Supp. 480; *Hadley* v. *MacDougall* (1872) 7 Ch. App. 312; *Kearsley* v. *Philips* (1883) 10 Q.B.D. 36, 40, 465-7.

To the courts below, however, "control", for purposes of this discovery order, meant something less than actual power to inspect and produce.[15] Indeed, the subsequent dismissal of petitioner's complaint was expressly predicated upon the trial court's belief that, though willing, petitioner *would not be able* to bring about discovery of the bank's records as ordered. (R. 1998 to 2000).

Such a construction is clearly at variance with the views held by other federal courts. There is also an inherent—and arbitrary—contradiction in maintaining that petitioner had sufficient "control" over the Sturzenegger records to justify the discovery order, and at the same time dismissing petitioner's complaint because petitioner *did not have* enough "control" over the same records to insure compliance with the same discovery order.

3. Discretion

Discovery under Rule 34 is discretionary with the trial court and is further mitigated by the provisions of Rule 30(b), Federal Rules of Civil Procedure, which prevents use of discovery to harass, embarrass or "as a stratagem to maneuver the adverse party into an unfavorable tactical position", *Aktiebolaget Vargos et al.* v. *Clark*, DC DC 1949, 8 F.R.D. 635; *Hickman* v. *Taylor*, 329 U.S. 495, at pp. 507-8; *Karlson* v. *Wolfson*, DC Minn. 1956, 18 F.R.D. 474, and numerous other cases where discovery was limited so as to avoid inconvenience and embarrassment to the party from whom it was demanded.

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[15] Petitioner at bar has admittedly neither possession nor custody of the bank's records.

By contrast, both courts below held that they *had no choice* but to dismiss petitioner's complaint without trial on the merits once they concluded that petitioner could not procure the records as ordered. Clearly, they did not consider discovery as a matter of sound discretion, to be dispensed by courts mindful of practicalities. In their opinion, discovery was a vested right impervious to considerations of convenience, availability and, indeed, of justice. Thus *ability* to make discovery was made into a mandatory jurisdictional requirement although it has never been shown that the bank's records contain material damaging to petitioner's claim.[16]

Petitioner submits that these novel views on discovery should be rectified by this Court to avoid the abuse of them by litigants desiring to harass their opponent or, as here, to evade trial on the merits.

Refusal to Inspect Over 200,000 Records Tendered by Petitioner as Substantial Discovery Was Arbitrary and a Denial of Due Process of Law

Since dismissal was predicated entirely on petitioner's alleged failure to make discovery, the trial court's arbitrary refusal to require respondents to examine the over 200,000 records tendered in good faith as substantial discovery deprived petitioner of its cause of action

[16] The Swiss Compensation Office which inspected the Sturzenegger files found that petitioner was neither an enemy nor controlled by enemies, nor acting as a cloak for them (R. 205-261; R. 262-324). It cannot be maintained, therefore, that there is any basis to conclude that the lower courts *were compelled* for reasons of justice and in the exercise of sound discretion to order production of the Sturzenegger records if the established inability to produce meant dismissal of petitioner's complaint without trial on the merits.

without a hearing and thus without due process of law.[17]

Denial of a hearing on substantial compliance was particularly arbitrary in view of the fact that any doubts as to whether the 200,000 or more records thus tendered constituted substantial discovery were attributable to and could be answered only by the trial court itself. Contrary to established procedures in all other courts, Moore's Federal Practice, 2d Ed., Vol. 4, pp. 2444-48, the court's discovery order failed to designate the records to be produced with sufficient particularity to allow petitioner—or indeed anyone—to identify them, *ante*, footnote 7, p. 7. As a result, petitioner had to resort to such guides as a list of crucial names supplied by respondents, *ante*, p. 12, to reconstruct the precise scope of the discovery intended by the trial court. Petitioner is convinced that, as a result of its efforts, it has tendered substantially all the records demanded. Until the opposite is shown by respondents and determined by the court, or until the court should designate the records to be produced with sufficient particularity to permit a finding that they are not all included in the 200,000 documents, petitioner is

[17] Within the time allowed, petitioner tendered for inspection by respondents about 192,000 documents brought to this country, and the 110 books of account of the bank in Switzerland, the latter to the extent that disclosure of the subject matters therein had been consented to by the owners of the banking secrets (R. 1951); and petitioner thereupon moved the trial court to vacate the order of dismissal of December 21, 1953 (R. 2011), stating in the memorandum that accompanied the motion that "The District Court should now determine by appropriate hearings and findings whether discovery has been made as required by it. If it has, then the order dismissing the complaint should be vacated." (R. 2013). The trial court summarily denied this motion without a hearing by order effective August 3, 1956.

entitled to assume that the records it has tendered to represent substantial compliance with the discovery order. Consequently, the dismissal of its complaint was arbitrary and entirely improper.

Full Investigation of Remaining Records as Suggested by Swiss Government Would Have Insured Complete Discovery and Thus Made Dismissal Unnecessary

The lower courts also turned down petitioner's request for sufficient time to trace, identify and obtain by other methods of discovery all relevant records, if any, remaining in the bank's files. This additional plan had been suggested by the Government of Switzerland as the only practical method to insure full insight into the remaining Sturzenegger records without violating the vested rights of bank customers under Swiss law.

The lower courts did not consider the merits of petitioner's proposal[18] and request for time to carry it out. They merely held that the interposition of an independent investigator was not permissible under established discovery procedures, and that they could not require respondents to join forces with petitioner even for the limited purpose of appointing an independent investigator and possibly of demanding production of certain records by letters rogatory.

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[18] As pointed out above, *ante*, pp. 12-14, the plan contemplated appointment by the parties of an independent investigator to examine the remaining bank files. The investigator would describe and identify any remaining relevant documents in a report to the parties at bar. On that basis, further attempts could be made to obtain the consent of recalcitrant bank customers. If they persisted in their refusal, documents pertaining to them could lawfully be obtained by means of letters rogatory to a Swiss court.

The courts' position disregards the discretionary and equitable nature of discovery, *ante*, p. 18, and is squarely in conflict with the view in other circuits. Under Rule 30(b) of the Federal Rules of Civil Procedure a trial court has the power, and indeed the obligation, to take any measures necessary to protect the parties from oppression and harassment through discovery, *ante*, p. 18. Independent investigators have been appointed for that purpose, *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation*, DC NY 1955, 16 F.R.D. 513. It is certain that the auxiliary discovery procedures suggested by petitioner would bring to light the nature and identity of every relevant document still remaining in the Sturzenegger files.[19] By not allowing petitioner to implement its additional discovery plan, the lower courts barred the only way in which petitioner could, by shedding light on the real nature of Sturzenegger records, disprove the theory underlying the courts' denial of jurisdiction that the bank records contained evidence damaging to petitioner's claim. Dismissal was avoidable and thus highly arbitrary. If the rulings below are allowed,

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[19] Even if, *arguendo*, some records could not be disclosed as such, the information obtained from the investigator would shed light on the nature and importance of any "missing" Sturzenegger records, assuming that any still exist in the bank's files. This means that, instead of dealing, as was done by both lower courts, with sheer speculation and surmise in connection with "missing" Sturzenegger records, they could now be identified so as to permit respondents to show concretely what missing papers are so indispensable in the preparation of their defense as to require dismissal without trial on the merits if the particular records could not be obtained. Indications are that no such "indispensable" documents exist in the bank's files. Nevertheless, both lower courts held that the vague and unsubstantiated possibility of damaging material remaining in the Sturzenegger files was sufficient to warrant dismissal of petitioner's complaints without trial on the merits.

to stand, they will permit a party to evade trial on the merits and yet win a judgment by demanding discovery of records and then refusing to help in obtaining their release.

Dismissal With Prejudice Where Not on the Merits is Contrary to Decisions of This Court

This Court held in *Hovey* v. *Elliott*, 167 U.S. 409 that, even where it was intended as punishment for contempt, dismissal of a complaint or striking of an answer without trial on the merits was a denial of due process of law. Cf. also *Duell* v. *Duell*, CA DC 1949, 85 U.S. App. D.C. 78, 82, 178 F. 2d 683, 689. In a subsequent case, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, this Court made an exception to the *Hovey* v. *Elliott* rule by upholding a dismissal where the *willful refusal* of a party to produce records *in its actual possession* allowed the inference that those records would have been damaging and that consequently the party's pleadings were made in bad faith. Thus, through the medium of a *rebuttable* presumption, dismissal in the *Hammond* case was on the merits, the disobedient party's claim not being supported by the evidence. See pp. 350-51 of 212 U.S. 322.

Admittedly, dismissal in the case at bar does not come within the exception of the *Hammond* case. The alleged non-production of Sturzenegger records was not willful, and therefore did not allow the lower courts to find by way of presumption that these records would have impaired petitioner's claim and that petitioner's complaint had thus been filed in bad faith. Evidence tending to show not only that the Sturzenegger records

contained no damaging evidence, but even that petitioner may have made full discovery as ordered, was disregarded in the proceedings below. Any presumption of bad faith under those circumstances would be unconstitutional under this Court's ruling in *Tot v. United States*, 319 U.S. 463; cf. also *McMullen v. Squier*, C.C.A. 9th, 144 F. 2d 703.

Denial of Jurisdiction in This Case Contravenes the Trading With the Enemy Act and Transforms Vesting Into a Taking of Private Property Without Due Process of Law

Dismissal in the case at bar was not, as stated above, a dismissal on the merits. The trial court could only have dismissed petitioner's complaint on the merits after a trial of the issues of fact or of law, or on a motion for summary judgment, or upon a showing that petitioner's claims were not supported by the evidence. The issues in this case of ownership of the vested assets and whether petitioner is a friendly neutral, were never adjudicated.

Clearly, then, dismissal of petitioner's complaint was a denial of jurisdiction in contravention of Section 9(a) of the Trading with the Enemy Act which imposes a duty on federal courts to adjudicate the issues upon which depends the right of a divested owner to recover his property.

Petitioner's complaint was duly filed under Section 9(a) of the Trading with the Enemy Act. That section allows any owner of property vested under the Act to file suit in federal courts and to recover his assets, if found not to be an enemy, ally of an enemy, or "enemy tainted"; *Clark v. Uebersee Finanz Korp.*, 332 U.S. 480. This Court has frequently held that

were it not for this possibility of judicial review under Section 9(a), any taking of property under the sweeping and summary vesting powers[20] of the Trading with the Enemy Act would be an unconstitutional taking of private property without due process of law. *Stoehr v. Wallace*, 255 U.S. 239.

Thus the jurisdictional provisions of Section 9(a) are not only mandatory because, as stated in *Hovey v. Elliott*, 167 U.S. 409 a court may not strike any pleadings without due process of law (i.e. adjudication on the merits) after suit has been duly filed and the jurisdictional requirements met; but, more importantly, by disregarding Section 9(a), the lower courts impaired the validity of the vesting of petitioner's property under the Trading with the Enemy Act, in that such vesting became an unlawful taking of private property without due process of law. (Fifth Amendment to the United States Constitution)

It follows from the foregoing that unless petitioner's complaint is reinstated and petitioner is allowed a hearing on the merits thereof, the administrative orders vesting its property without any determination that petitioner was an enemy are void; and the United States Government will have been enriched without such "taking" having been subjected to judicial scrutiny.

[20] Under Section 5(b) of the Act property of any foreign national can be vested; there need be no determination that the owner is an enemy. 50 U.S.C. App. 5(b).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
PEIDER KONZ

August 6, 1957.

APPENDIX A

Constitutional Provision

AMENDMENT V

"* * * nor shall any person * * *; * * * be deprived of life, liberty, or property, without due process of law; * * *"

Statutes

RULE 30(b), FEDERAL RULES OF CIVIL PROCEDURE

RULE 30. Depositions Upon Oral Examination.

* * * * * * * * * * *

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present, except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * * * * * * * * * *

Rule 34, Federal Rules of Civil Procedure

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. Dec. 27, 1946, effective March 19, 1948.

Trading With the Enemy Act, Section 5(b) Title 50, U.S.C., App. § 5(b)

§ 5. Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver.

* * * * * * * * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

* * * * * * * * * * *

TRADING WITH THE ENEMY ACT, SECTION 9(a)
TITLE 50, U.S.C., APP. §9(a)

§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from

an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian of the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act

[sections 1-6 and 7-39 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided June 30, 1955

Mr. John J. Wilson, with whom *Mr. Roger J. Whiteford* was on the brief, for appellant.

Assistant Attorney General Townsend, of the bar of the Court of Appeals of New York, *pro hac vice*, by special

leave of Court, and *Mr. David Schwartz*, Attorney, Department of Justice, with whom *Messrs. George B. Searls, Sidney B. Jacoby, Paul E. McGraw* and *Ernest S. Carsten*, Attorneys, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* The District Court dismissed a complaint filed therein by I. G. Chemie[1] against the Attorney General of the United States, as successor to the Alien Property Custodian,[2] and the Treasurer of the United States.[2] The Complaint was filed October 21, 1948, under the provisions of Section 9(a) of the Trading with the Enemy Act, 40 Stat. 411, 419, as amended, 50 U.S.C.A. App. § 9(a), to recover properties allegedly valued at more than $100,000,000 which the Custodian had vested, under Section 5(b) of the Act and regulations thereunder, as the property of foreign nationals or of German interests.[3] The property vested is over 90% of the stock of General Aniline & Film Corporation, of Delaware, and some $1,800,000 in various bank accounts and securities. I. G. Chemie itself is a Swiss holding corporation having its domicile at Basel, Switzerland. It claims ownership of the vested stock of General Ani-

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[1] We use this designation, or Chemie, for brevity, in referring to the plaintiff in the District Court, the appellant in this Court. The fuller name of the party is Societe Internationale Pour Participations Industrielles et Commerciales S.A. and Internationale Industrie- & Handelsbeteiligungen A.G. The plaintiff is also known as "Interhandel".

[2] See Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981. The Attorney General and Treasurer are referred to for simplicity as the Custodian.

[3] See, *e.g.*, Vesting Order of February 16, 1942, 7 Fed. Reg. 1046, Vesting Order No. 5 of April 24, 1942, 7 Fed. Reg. 3148; Vesting Order 907, of February 15, 1943, 8 Fed. Reg. 2453.

line & Film Corporation and of the cash. It asserts that it is not an enemy within the meaning of the Act and, accordingly, availed itself first of the statutory procedure for seeking return of the property by filing an administrative claim with the Custodian. See § 9(a) of the Act. Upon denial of its administrative claim Chemie, as also authorized by § 9(a), sued in the District Court for recovery of the property. The Custodian in his answer denied the property was owned by Chemie and also denied Chemie's allegations that it was not an enemy within the meaning of the Act. The pleadings came to issue on these conflicting claims of ownership and enemy character.

On July 5, 1949, with the pleadings in the situation outlined, the District Court, Chief Judge Laws sitting, on cross-motions, ordered both Chemie and the Custodian to produce for inspection certain documents.[4] Among those ordered to be produced by Chemie were records of H. Sturzenegger & Cie., a Swiss banking concern domiciled, like Chemie, in Basel. Before their production, however, constructive possession of these documents was taken by the Swiss Federal Attorney on June 21, 1950, by his order of June 15, 1950, or as is sometimes referred to in the proceedings, he seized or confiscated them. His order recited that their production would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law "which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power". Chemie thereupon, June 22, 1950, moved in the District Court to be relieved of that portion of the order of July 5, 1949,

[4] See opinion of Chief Judge Laws of June 23, 1949, *Societe Internationale Pour Par., Etc.* v. *Clark*, 9 F.R.D. 263, 13 Fed. Rules Serv. § 34.11, Case 1 (D.C. D.C.).

which required it to produce the Sturzenegger records for inspection by the Custodian, stating, as counsel were informed by cable of June 21, 1950, that Sturzenegger & Cie. had been prohibited by order of the Swiss Federal Attorney from delivering its records for such inspection.

On October 31, 1950, the Custodian moved to dismiss the complaint under Rule 37(b)(2), Fed. R. Civ. P., for failure of Chemie to produce the Sturzenegger papers. The Custodian also filed a motion for such relief as should be deemed just and appropriate, including a ruling that all matters which defendants could possibly show by the papers be taken as proven. This motion stated that because of the seizure the court's order of July 5, 1949, would not be complied with by Chemie in Switzerland, and intimated the seizure was procured, and could be undone, by Chemie.

With the matter unresolved the court by order of March 1, 1951,[5] ordered William J. Hughes, Jr., Esq., as Special Master to hold proceedings and take evidence as to the good faith of Chemie in its efforts to comply with the production order of July 5, 1949, and directed him to report his findings and conclusions to the court for consideration in connection with Chemie's motion, filed November 29, 1950, for reconsideration of its motion of June 22, 1950, to be relieved of producing the papers. On December 4, 1951, the Special Master filed his opinion, and on July 9, 1952, filed his findings of fact and conclusions, which on Chemie's motion were adopted by the court March 31, 1953. The Special Master found no evidence of collusion between Chemie and the Swiss Government in the matter of the seizure. He made a detailed report favorable to Chemie's conduct in the mat-

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[5] See opinion of Chief Judge Laws, *Societe Internationale, Etc.* v. *McGrath*, 11 F.R.D. 294 (D.C. D.C.).

ter, including its good faith. The District Court said of this report:

> "* * * The report is well-considered and there is substantial evidence to support the findings. While it may be true plaintiff did not exercise the utmost diligence and persistence in seeking to rescind the seizure order of the Swiss Federal Attorney in respect of the Sturzenegger papers, the court finds plaintiff's efforts were those of a reasonable and prudent person in face of the obstacles confronting it. The court will overrule the Government's exceptions and adopt the Master's findings that the order of the Swiss Federal Attorney, dated June 15, 1950, confiscating the records, books, and files of the firm of H. Sturzenegger & Cie. is legally supportable under Swiss law, and that plaintiff demonstrated good faith in its efforts to secure production of the papers of H. Sturzenegger & Cie., as ordered by this court on July 5, 1949."

Societe Internationale, Etc. v. *McGranery*, 111 F. Supp. 435, 440 (D.C. D.C.).

The court also said, however, that the Special Master's report did not resolve the issue either of Chemie's motion to be relieved of production or of the Custodian's motion to dismiss Chemie's complaint.

Some additional facts should be adverted to before coming more closely to grips with the court's ultimate dismissal of the complaint. After the court ordered the Sturzenegger records to be produced Chemie made unsuccessful efforts to obtain their release by the Swiss authorities. Chemie and the Sturzenegger Bank also sent letters to some of the latter's customers seeking waivers of their secrecy rights in the records. The court by various orders extended the time for compliance into the month of October, 1953. During the intervening period waivers were obtained from a substantial number of per-